In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 1115

J. W. HAMPTON, JR., & CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE COURTS BELOW

The opinions of the courts below are reported as follows:

The opinion of the United States Court of Customs Appeals, T. D. 42030, 51 Treas. Dec. ____. (R. 77–101.)

The opinion of the Board of United States General Appraisers (now United States Customs Court), T. D. 41478, 49 Treas. Dec. 593. (R. 12–74.)

JURISDICTION

The judgment of the Court of Customs Appeals was entered February 24, 1927. (R. 102.) Its

mandate was issued March 26, 1927. (R. 102.) The petition for certiorari was filed May 10, 1927. The jurisdiction of this Court to issue a writ of certiorari to review a judgment of the Court of Customs Appeals is conferred by Section 195 of the Judicial Code, as amended by the Act of August 22, 1914, c. 267, 38 Stat. 703, but as limited by Section 8 (a) of the Act of February 13, 1925. *United States* v. *Lippmann, Spier & Hahn,* 260 U. S. 742. The Attorney General filed a certificate of importance October 16, 1926. (R. 76.) The Act of August 22, 1914, prescribes a limit of sixty days after the mandate issues within which to apply for certiorari. Section 8 (a) of the Act of February 13, 1925, prescribes a limitation of three months from the date of the judgment. Both limitations apply as the Act of 1925 did not enlarge any period of limitation prescribed by other statutes. In this case the petition was filed in time under both statutes.

THE QUESTION

The question presented is whether the flexible tariff provisions in the Tariff Act of 1922, giving to the President power to vary tariffs to meet differences ascertained by him in costs of production at home and abroad are unconstitutional as a delegation of legislative authority.

THE STATUTE

Section 315 (a) of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 941), is as follows:

That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

STATEMENT

An importation of barium dioxide was entered for duty at 4 cents per pound, the rate set forth in Paragraph 12, Title I, of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 860). The Collector of Customs, however, levied duty at the rate of 6 cents per pound by virtue of a proclamation of the President reported in T. D. 40216 (45 Treas. Dec. 669), and set forth in the Record at pages 79, 80. This proclamation was issued in accordance with the provisions of Section 315, Title III, of said Act, which are quoted in full in the petition (pp. 4–9).

The petitioner challenges the constitutionality of the provisions of said Section 315, alleging that Congress in enacting the statute delegated to the Executive Department the power to legislate in derogation of Section 1 of Article I of the Constitution of the United States, which provides that:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

The trial court, one member dissenting, upheld the constitutionality of the Act in question (R. 12–74), and on review the Court of Customs Appeals, in a unanimous opinion, affirmed the lower court (R. 77–102).

SUMMARY OF ARGUMENT

The legislative and judicial history of the times since the case of the *Brig Aurora*, 7 Cranch (11

U. S.) 382, and *Wayman* v. *Southard,* 10 Wheat. (23 U. S.) 1, reviewed in *Field* v. *Clark,* 143 U. S. 649, *Buttfield* v. *Stranahan,* 192 U. S. 470, and numerous later decisions of this Court down to and including *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, contain elaborate and exhaustive opinions explaining and defining the principle of delegated power in related statutes. From an examination of those cases it would seem that the question presented in the case at bar is not an open one in this Court.

Section 315 does not delegate to the President the power to tax. What the President is required to do is simply in execution of the Act of Congress. He is merely the agent of the lawmaking department to ascertain the facts prescribed by Congress and declare the event upon which its expressed will is to take effect. The statute invests the President with no discretion or judgment in proclaiming a duty, but authorizes him to proclaim only the duty shown by a prescribed "state of things" or as shown by ascertained "facts" legislatively prescribed. *Field* v. *Clark, supra.*

Section 315 is not an invasion of the "general welfare" clause of Section 8 of Article I of the Constitution; neither is its constitutionality imperiled because, as alleged in the petition (p. 10), action under it is not subject to judicial review.

ARGUMENT

In *Field* v. *Clark,* 143 U. S. 649, decided in 1892, this Court gave a learned and exhaustive review of

the legislative and judicial history of the principle of delegated power beginning with the case of the *Brig Aurora,* 7 Cranch (11 U. S.) 382, decided in 1813, and the doctrine announced in *Field* v. *Clark* has been cited with approval and followed in numerous cases down to and including *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, decided in 1926.

See:

Buttfield v. *Stranahan,* 192 U. S. 470;
Union Bridge Co. v. *United States,* 204 U. S. 364; and
Hannibal Bridge Co. v. *United States,* 221 U. S. 194.

In the light of these authorities, the case does not present a constitutional question differing in principle from that already decided several times by this Court.

Section 315 does not delegate to the President the power to tax, as alleged by petitioner; it levies a tax in terms of a "state of things" or "facts," namely, the difference in cost of production in the United States and the principal competing foreign country, and merely delegates to the President the power to ascertain and proclaim that difference. We quote from *Field* v. *Clark, supra,* at page 693, 694:

> "The true distinction," as Judge Ranney speaking for the Supreme Court of Ohio has well said, "is between the delegation of power to make the law, which necessarily

involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, Wilmington &c Railroad* v. *Commissioners,* 1 Ohio St. 88. In *Moers* v. *City of Reading,* 21 Penn. St. 188, 202, the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." So, in *Locke's Appeal,* 72 Penn. St. 491, 498: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction the court said was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making

power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.

In the case at bar the President has acted strictly within the rule above announced and, upon a finding of fact as to the difference in cost of production at home and abroad of a given commodity, a rate of duty, measured by the difference in cost of production so found, has been imposed in accordance with the expressed will of Congress as declared in Section 315.

In *Field* v. *Clark, supra,* the appellant claimed that Section 3 of the Tariff Act of October 1, 1890, c. 1244, 26 Stat. 567, 612, was unconstitutional and void, in that it delegated to the President the power of laying taxes and duties, which power by Sections 1 and 8 of Article I of the Constitution is vested in Congress. Said Section 3 provided as follows:

> That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, * * * *whenever, and so often as the President shall be satisfied* that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, * * * *imposes duties or other exactions upon the agricultural or other products of the United States,* which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States *he may deem to be reciprocally unequal and unreasonable,* he shall have the power and it shall be his duty to suspend, by

> proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, *for such time as he shall deem just,* and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely: (Here follows an enumeration of such articles and the prescribed duties.) (Italics ours.)

Viewed with reference to what delegation of authority was upheld in that case, it is significant to note that the facts, conditions of trade, or "state of things," by comparison of which the President was to determine "reciprocal equality and reasonableness," were the effects upon our trade of the tariff laws not only of the United States but of foreign countries. He was to investigate and determine the effect of foreign tariffs upon the exports of our agricultural and other products to foreign countries and the effect of our tariff granting free entry to imports of certain articles imported from such countries, balance and measure these resulting trade conditions one with the other, and if he "deemed" the relative trade conditions so resulting "reciprocally unequal and unreasonable," so proclaim, suspend our tariff laws, and put into effect certain rates of duty by Congress prescribed, which in turn he might also suspend "for such time as he may deem just."

There is no difference in principle between Section 3 of the Act of 1890, *supra*, and Section 315 of the Act of 1922, *supra*. In the former Act the Congress prescribed the substitute rates in terms of fixed figures; in the latter the Congress has prescribed the substitute rates in terms of prescribed "facts" or "state of things."

Congress by Section 315 fixed the primary standard by which rates of duty might be raised or lowered and the statute devolved upon the President the mere executive duty to effectuate the legislative policy declared in the statute.

Buttfield v. *Stranahan*, 192 U. S. 470.

To quote the language of this Court in *Union Bridge Co.* v. *United States*, 204 U. S. 364, at 387:

> Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

In answer to the allegation of petitioner (Pet., p. 9) that never in our history has the power been given to a delegee to fix, change, and amend a rate of duty, much less the entire dutiable schedule of the Tariff Act, reference is made to the following statutes imposing duties on tonnage:

Revised Statutes, Secs. 2502, 4219, 4228;

Act of July 26, 1892, c. 248, Sec. 1, 27 Stat. 267; and

Act of June 26, 1884, c. 121, Sec. 14, 23 Stat. 53, 57;

and statutes providing for countervailing duties, bounties, etc.:

Act of Oct. 1, 1890, c. 1244, Sec. 3, 26 Stat. 567;

Act of July 24, 1897, c. 11, Sec. 5, 30 Stat. 151, 205;

Act of Aug. 5, 1909, c. 6, Sec. 6, 36 Stat. 11, 85;

Act of Oct. 3, 1913, c. 16, Sec. IV, Par. E, 38 Stat. 114, 193;

Act of Sept. 21, 1922, c. 356, Title III, Sec. 303, 42 Stat. 858, 935,

in each of which the power to ascertain the facts, or the amount of bounty, countervailing duty, or otherwise, and translate the same into an equivalent rate or amount of duty, to be imposed in a given case, has been delegated by Congress to the Executive or an administrative officer. This has been done in variance of the legislatively fixed rate or amount of duty.

Nicholas & Co. v. *United States,* 249 U. S. 34.
Franklin Sugar Refining Co. v. *United States,* 178 Fed. 743.

In the instant case the cost of production *was found* as the proclamation of the President clearly indicates. To say that it can not be found, as alleged by the petitioner, begs the question. If instances arise where the cost of production can

not be found, the President does not and can not act, and in such cases the statute would be inoperative only but it would not for that reason be unconstitutional. The Customs Administrative Acts for all time have measured duties by the cost of production found by appraising officers, even though the statute did not expressly provide therefor.

Muser v. *Magone,* 155 U. S. 240.

The statute does not empower the President to exercise discretion, opinion, etc., to determine the amount of the tax, but merely a discretion as to when Section 315 shall operate.

The contention of the petitioner that it appears on the face of the statute that it provides for a levy for trade advantage to particular citizens, and is therefore not a tax laid for the "common defense and general welfare," is without merit. It might be contended with equal reason that every dutiable provision in a protective tariff Act is designed to provide a levy for the trade advantage of a particular citizen or group of citizens. It is a matter of public history that many of our tariff Acts, including the present one, have been framed on the underlying policy of protection.

Act of June 26, 1884—

> An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, etc., c. 121, Sec. 14, 23 Stat. 53, 57,

and the tariff Acts of—

July 24, 1897, c. 11, Sec. 5, 30 Stat. 151, 205;

Aug. 5, 1909, c. 6, Sec. 6, 36 Stat. 11, 85;

May 27, 1921, c. 14, 42 Stat. 9; and

Sept. 21, 1922, c. 356, 42 Stat. 858.

Note also *United States* v. *Stone & Downer Co.*, No. 150, October Term, 1926, decided May 16, 1927 (not yet reported), page 12 of the opinion.

Whatever encourages the industries of the United States and tends to maintain their existence in competition with foreign countries, is obviously for the general welfare of the United States. Whatever provides revenue for the conduct of the Government of the United States obviously provides for its general welfare.

With respect to the contention urged by petitioner that the acts of the President under Section 315 are not subject to judicial review, reference is made to:

Auffmordt v. *Hedden*, 137 U. S. 310, 324;
Passavant v. *United States*, 148 U. S. 214, 220;
Stairs v. *Peaslee*, 18 How. (59 U. S.) 521;
Hilton v. *Merritt*, 110 U. S. 97, 107.

In the latter case this Court used the following language:

> The plaintiffs in error contended further that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise, is depriving the importer of his

property without due process of law, and is therefore forbidden by the Constitution of the United States. The cases of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, and *Springer* v. *United States*, 102 U. S. 686, are conclusive on this point against the plaintiff in error.

CONCLUSION

The validity of this statute is a matter not open to reasonable disputation. There is nothing to be gained by issuing the writ of certiorari for the purpose of affirming the judgment. For all practical purposes the denial of the writ will set the question at rest.

The petition is therefore without merit and should be denied.

Respectfully submitted.

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MAY, 1927.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
The questions	2
The statute	3
Statement	7
Summary of argument	8
Argument:	
I. Section 315 of the Tariff Act of 1922 does not unlawfully delegate legislative power	10
II. Protective tariffs are authorized	26
Conclusion	29
Appendix:	
Report of the United States Tariff Commission to the President, transmitted May 14, 1924, concerning differences in cost of production of barium dioxide in the United States and in competing foreign countries	31
Proclamation by the President increasing rate of duty on barium dioxide	42
Digest of Tariff Commission Reports under section 315 of the Tariff Act of 1922	45

CITATIONS

Cases:	
Abby Dodge, The, 223 U. S. 166	28
Brig Aurora, The, 7 Cranch 382	14, 15
Brolan v. *United States*, 236 U. S. 216	28
Buttfield v. *Stranahan*, 192 U. S. 470	18, 27
Field v. *Clark*, 143 U. S. 649	14
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194	19
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149	20
Miller v. *Mayor of New York*, 109 U. S. 385	18
Monongahela Bridge Co. v. *United States*, 216 U. S. 177	18
Mutual Film Corp. v. *Kansas*, 236 U. S. 248	20
Mutual Film Corp. v. *Ohio Industrial Commission*, 236 U. S. 230	19
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320	28
Red "C" Oil Mfg. Co. v. *North Carolina*, 222 U. S. 380	18
Strathearn S. S. Co. v. *Dillon*, 252 U. S. 348	28

Cases—Continued. Page
Union Bridge Co. v. *United States*, 204 U. S. 364 18
United States v. *Grimaud*, 220 U. S. 506 20
United States v. *Lippman, Spier & Hahn*, 260 U. S. 742 2
Washington v. *Dawson & Co.*, 264 U. S. 219 ..... 20, 21
Wayman v. *Southard*, 10 Wheat. 1 ..... 14, 21
Weber v. *Freed*, 239 U. S. 325 28
Yee Hem v. *United States*, 268 U. S. 178 28
Statutes:
Act of July 4, 1789, c. 2, 1 Stat. 24 ..... 26, 27
Tariff Act of September 21, 1922, c. 356, 42 Stat. 858, 860, 941:
Title I, par. 12; U. S. C. Title 19, sec. 121 3
Title III, sec. 315; U. S. C. Title 19, sec. 154 3
Miscellaneous:
35 Op. A. G. 29 11
35 Op. A. G. 325 24
Cong. Rec., 67th Cong., 2d sess., vol. 62, pt. 12, p. 12508 ... 11
"The relation of transportation costs to costs of production," published by the United States Tariff Commission, Government Printing Office, 1926 11

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Board of General Appraisers (now United States Customs Court), R. 11–71, is reported in 49 T. D. 593, T. D. 41478. The opinion of the United States Court of Customs Appeals, R. 73–105, is reported in 14 Ct. Customs Appeals 350; 51 T. D. 224, T. D. 42030.

JURISDICTION

The judgment of the Court of Customs Appeals was entered February 24, 1927. (R. 105.) Its mandate was issued March 26, 1927. (R. 105.) The petition for certiorari was filed May 10, 1927,

and granted June 6, 1927. (R. 106.) The jurisdiction of this Court to issue a writ of certiorari to review a judgment of the Court of Customs Appeals is conferred by Section 195 of the Judicial Code, as amended by the Act of August 22, 1914, c. 267, 38 Stat. 703, but as limited by Section 8 (a) of the Act of February 13, 1925. *United States* v. *Lippmann, Spier & Hahn*, 260 U. S. 742. The Attorney General filed a certificate of importance October 16, 1926. (R. 72.) The Act of August 22, 1914, prescribes a limit of sixty days after the mandate issues within which to apply for certiorari. Section 8 (a) of the Act of February 13, 1925, prescribes a limitation of three months from the date of the judgment. Both limitations apply as the Act of 1925 did not enlarge any period of limitation prescribed by other statutes. In this case the petition was filed in time under both statutes.

THE QUESTIONS

This case presents the question whether the flexible tariff provisions of the Tariff Act of 1922, giving to the President power to increase or decrease tariffs, within limits fixed by the statute, to equalize differences in costs of production at home and abroad, found by him to exist after inquiry and report by the Tariff Commission, are unconstitutional, as a delegation of legislative power.

Another question, if it may be called a question, is whether Congress has power, when laying duties on imports, to frame the statute to protect American industry.

THE STATUTE

The Tariff Act of September 21, 1922 (c. 356, 42 Stat. 858, 860; U. S. C. Title 19, Section 121), paragraph 12, of Title I, provides a duty as follows:

> Par. 12. * * * barium dioxide, 4 cents per pound; * * *.

Section 315 of Title III of the Act (c. 356, 42 Stat. 858, 941; U. S. C. Title 19, Section 154) is as follows:

> Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign

country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as

defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provision of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of

subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall

be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

STATEMENT

June 20 and 24, 1924, the petitioner imported at the port of New York 292 drums of barium dioxide. (R. 8.) Paragraph 12 of Title I of the Tariff Act of

1922 provides a duty at four cents per pound. Prior to the arrival of this merchandise and on May 19, 1924, the President had issued a proclamation, pursuant to Section 315 of Title III of the Tariff Act of 1922, raising the rate from four cents per pound to six cents per pound, and the collector assessed the duty at six cents per pound in accordance with the proclamation. The importer thereupon filed a protest claiming that the merchandise was dutiable at four cents per pound (R. 7), and asserting that Section 315 is unconstitutional and void because a delegation of legislative power and because the section purports to levy duties not for the purposes of raising revenue but for the protection of American industries (R. 8). This protest, in due course, was referred by the collector to the Board of General Appraisers (R. 9), and the Board overruled the protest and sustained the assessment by the collector (R. 71). The petitioner then took the case to the United States Court of Customs Appeals (R. 1), and the assignments of error raised the points here presented (R. 2). The United States Court of Customs Appeals affirmed the judgment of the Board of General Appraisers. (R. 105.) The proclamation of the President and the report of the Tariff Commission, on which it was founded, are set forth in the appendix.

SUMMARY OF ARGUMENT

I. The statute does not attempt an unlawful delegation of legislative authority. It delegates to the President the power to find facts, not the power

to make law. He is to determine, with the assistance of the Commission, the domestic and foreign costs of production and the difference between them. The rules to be applied to the facts so found, in order to determine the new rate of duty, are prescribed by the statute. Congress may delegate to others a fact-finding power which the Legislature may rightfully exercise itself. Although Congress can not delegate its power to make the law, it can make a law delegating a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. The rule of law prescribed by this statute is, that within the limits fixed in the statute, tariffs shall be adjusted to equalize the difference in the costs of production of foreign and domestic merchandise.

That in some case such costs may not be ascertainable does not make the statute invalid, but merely renders it inoperative in the particular case. That there may be difficulty in ascertaining the exact costs of production does not render it invalid. Because of limits fixed by the statute upon changes in rates, exact costs of production are not necessary to be known in the majority of cases. In them it is enough to know that the costs are not less in some cases or more in others than stated amounts. The discretion left to the President under this statute is a discretion in matters of fact and in respect of the weight of evidence and not as to the rules or principles to be applied.

II. The contention that a tariff Act framed with a view to the protection of American industry is beyond the power of Congress is without any substance.

ARGUMENT

I

SECTION 315 OF THE TARIFF ACT OF 1922 DOES NOT UNLAWFULLY DELEGATE LEGISLATIVE POWER

The purpose of Congress in enacting Section 315 was to bring about increases or decreases in the tariffs to equalize differences in the costs of production at home and abroad which might be disclosed as the result of inquiry by the President and the Tariff Commission. The purpose was not only to raise revenue, but to so adjust the tariff as not, on the one hand, to exclude foreign merchandise or, on the other, to admit it under conditions giving the foreign manufacturer or producer an advantage over domestic producers in the markets of the United States. Although the Act uses the phrase "costs of production" at home and abroad, by it was not meant merely the cost at the point of manufacture or production. The markets within the United States are the only places where competition between foreign and domestic merchandise occurs which is affected by our tariffs, and, in respect to products of foreign countries, by cost of production was undoubtedly meant the cost of placing the foreign products in our markets.

This is made clear not only by the general scope and purpose of the Act, but by subdivision (c) of

Section 315, which provides that the President, in so far as he finds it practicable, shall take into consideration not only the differences in conditions in production, including wages, costs of material, and other items in costs of production, but differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States, as well as advantages granted to a foreign producer by a foreign Government and any other advantages or disadvantages in competition. The cost of transportation from the foreign point of production to the markets of the United States is therefore an element in determining the cost of production within the meaning of this statute. The Attorney General so construed the Act in an opinion rendered February 2, 1926. (35 Op. 29.) See, also, "The relation of transportation costs to costs of production," a pamphlet by the United States Tariff Commission, Government Printing Office, 1926.

When this bill came from conference Mr. Fordney, Chairman of the Committee on Ways and Means, in charge of the measure, said:

> * * * the bill directs the Tariff Commission to find the difference between the cost of production in the United States and the landed cost of the imported article and to report the same to the President of the United States. (Cong. Record, 67th Cong., 2d Sess., Vol. 62, Part 12, p. 12508.)

The final decision is left to the President, but there must, first, be an investigation and report by the

Tariff Commission. Before any change in the tariff may be made by the President he must find, as a fact, that there are differences in the costs of production at home and abroad, and that such change is necessary to equalize the differences. If, in any case, costs of production are not ascertainable, no change can be made. If the duty fixed by the Act is a specific duty, such as that on barium dioxide, the only adjustment permitted is an increase or decrease of the rate, but the increase or decrease may not exceed 50 per cent of the rate specified in the Act. No change in the form of duty, such as a change from a specific to an *ad valorem* basis, is permitted.

If the duty fixed by the Act is on an *ad valorem* basis, the increase or decrease may be brought about by the President by an increase or decrease in the rate, with the same 50 per cent limitation, or by change in classification, as provided in subdivision (a), but if these methods of equalizing the difference in costs of production are inadequate, the President is directed by subdivision (b) to change the basis of the *ad valorem* duty from the foreign value to the American selling price. In that case the rate fixed by the statute shall not be increased, nor shall it be decreased more than 50 per cent.

From this brief analysis of the statute, it is evident that the policy declared in the statute, which the President is directed to apply, is that, so far as the limitations fixed by the statute permit, the tariff shall be adjusted to equalize the difference between the costs of domestic and foreign merchandise in the

markets of the United States. The statute not only prescribes a principle to be applied, but a specific formula. To the President is left the finding of facts. When the facts are found, the statute does the rest. Aside from the finding of fact as to costs of production, the action of the President is hardly more than an announcement of the result.

Under subdivision (a) the President may choose between changing the rate and changing the classification, but only for the purpose of producing the result prescribed by the statute, which is to fix a tariff equalizing the difference in costs of production. If the method prescribed in subdivision (a) in the case of *ad valorem* duties does not equalize the difference, the statute itself in subdivision (b) directs that the American-selling price basis shall be adopted, and the statutory rate left as it is or decreased to the point necessary to make the equalization. The petitioner suggests that, under subdivision (b), since the decrease in rate may not be more than 50 per cent of the statutory rate, a case may be imagined where the use of the American-selling price as a basis would result in a tariff higher than that necessary to equalize differences in costs of production, but if any such case ever arises the result will be one expressly directed by Congress.

It has long been settled that although a legislature can not delegate its power to make a law, it may by law delegate a power to determine some fact or state of things upon which the law makes, or intends to

make, its own action depend. One of the earliest cases is *The Brig Aurora*, 7 Cranch 382.

In *Wayman* v. *Southard*, 10 Wheat. 1, Chief Justice Marshall said (p. 41):

> It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. *But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.* * * * (Italics ours.)

In *Field* v. *Clark*, 143 U. S. 649, the Court dealt with a section of a tariff Act which read as follows (p. 680):

> That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, * * * *whenever, and so often as the President shall be satisfied* that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, * * * *imposes duties or other exactions upon the agricultural or other products of the United States*, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States *he may deem to be reciprocally unequal and unreasonable*, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, *for such time as he shall deem just*, and in such case and during such suspension duties shall be levied, collected and paid upon

> sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely: (Here follows an enumeration of such articles and the prescribed duties.) (Italics ours.) (26 Stat., 612.)

The Court, after reviewing many Acts of Congress, deemed by it similar to this and as a congressional precedent therefor, and upon the authority of the case of *The Brig Aurora, supra*, said:

> That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress *itself* determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President *deemed*, that is, *which he found to be*, reciprocally *unequal* and *unreasonable*. Congress *itself* prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses,

coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. *Nothing involving the expediency or the just operation of such legislation* was left to the determination of the President. The words, "*he may deem*," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, *and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact* that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, *it became his duty to issue a proclamation* declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the *enforcement* of the policy established by Congress. *As the suspension was absolutely required when the President ascertained the existence of a particular fact, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.* Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. *What the President was required*

to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

"The true distinction," as Judge Ranney speaking for the Supreme Court of Ohio has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and *conferring authority or* discretion as to its execution, to be exercised under and in *pursuance of the law.* The first can not be done; to the latter no valid objection can be made." *Cincinnati, Wilmington, &c., Railroad* v. *Commissioners,* 1 Ohio St., 88. In *Moers* v. *City of Reading,* 21 Penn. St., 188, 202, the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law." So, in *Locke's Appeal,* 72 Penn. St., 491, 498: "To assert that a law is less than a law, because it is made to depend on a future *event or act,*

> is to rob the ligislature of the power to act wisely for the public welfare *whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.*" The proper distinction the court said was this: "The legislature can not delegate its power to make a law; *but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation." [*Field* v. *Clark*, 143 U. S. 649, at pp. 692–694.] (Italics ours.)

See *Miller* v. *Mayor of New York*, 109 U. S. 385; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 192.

In *Buttfield* v. *Stranahan*, 192 U. S. 470, the Court sustained an Act authorizing administrative officers to establish standards of purity and wholesomeness of tea and to exclude from the country tea which did not conform to those standards.

In *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U. S. 380, a case arising in a Federal court, it was held that legislative power which belonged exclusively to a State legislature was not delegated by a State statute requiring that illuminating oils furnished in

that State be safe, pure, and afford a satisfactory light, and directing that a board of agriculture determine what oils would measure up to those standards.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, it was held that no unlawful delegation of legislative power was made by a statute authorizing the Interstate Commerce Commission to prescribe a uniform system of accounting and bookkeeping for interstate carriers. The Court said (p. 214):

> The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.

In *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, the Court sustained a State film censorship law which provided that (p. 240):

> Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board.

and at page 245:

> Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but

> an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and in execution.

(See, also, *Mutual Film Corporation* v. *Kansas*, 236 U. S. 248.)

In *United States* v. *Grimaud*, 220 U. S. 506, the Court construed an Act authorizing the Secretary of Agriculture to make rules and regulations governing the national parks, and held that such a rule relating to grazing sheep on forest reserves, having the force of law and providing criminal punishment for violation thereof, was not unconstitutional as a delegation of legislative power. The Court said (p. 521):

> That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U. S., 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

The only cases we find in which this Court has declared legislation unconstitutional, upon the ground that it delegated legislative power, are *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *Washington* v.

Dawson & Co., 264 U. S. 219, in which it was held that Acts of Congress which undertook to permit the application of workmen's compensation laws of the several States to injuries within the maritime and admiralty jurisdiction were invalid.

The present case is squarely within the principle stated in this long line of decisions. Congress has not delegated to the President its power to make a law. It could undertake in every case, through committees, to determine for itself costs of production at home and abroad, and it has thus delegated to the President power to do a thing which the Congress itself may do, but that is not a delegation of legislative authority. As Chief Justice Marshall said in *Wayman* v. *Southard*, *supra:*

> Congress may certainly delegate to others, power which the legislature may rightfully exercise itself.

Petitioner asserts that the Act is unconstitutional because the President is allowed under it to exercise discretion. He may exercise discretion and judgment, but it is in respect of matters of fact and the weight to be given to evidence and the inferences to be drawn from it. Once the facts are settled and difference in costs of production has been ascertained, he is bound to compute and proclaim the new tariff according to the directions of the statute.

A large part of the petitioner's brief is devoted to assertions that the subject is so complicated that costs of production at home and abroad are not ascertainable. This is a mere assertion, not supported by

the record. In the case of barium dioxide the report of the Tariff Commission discloses that it had no difficulty in ascertaining the costs of production at home and abroad with sufficient accuracy to apply the statute. The courts may not take judicial notice of the circumstances entering into the costs of production of all imported articles or say, as a matter of judicial knowledge, that such costs are not ascertainable.

In any case where the costs are not ascertainable, the President is not authorized to make any change in the tariff, and the presumption is he will not. Of the 25 cases in which the Tariff Commission has made reports, under Section 315, in two (those relating to sugar and casein) the President declined to change the tariff because the costs had not been ascertained with sufficient definiteness to justify it.

In the sugar report, the Commission divided 3 to 2 as to the matter of costs, and the President held that the costs had not been ascertained with sufficient definiteness to justify a change in the tariff. In the report on casein, the Commission held that the data available did not disclose the costs definitely, and the President made no change in the tariff. The mere fact that Section 315 does not operate to produce any change in the tariff where the costs are not ascertainable does not make the statute invalid as an unlawful delegation of legislative authority.

Furthermore, because of the limits placed by the statute upon the extent of changes in tariffs under Section 315, it is not always necessary to determine

costs of production at home and abroad with any great degree of accuracy. This is illustrated by the present case. The specific duty fixed by the statute on barium dioxide was four cents per pound. Subdivision (a) of Section 315 limited the President to increasing or decreasing this duty not to exceed 50 per cent of the statutory rate. The maximum duty which he could fix under the statute was six cents per pound. The Commission reported and the President found that the difference in costs of production at home and in the principal competing foreign country was more than six cents per pound.

In the present case it was necessary only to determine that the difference in cost was at least six cents per pound. So, in the case of the report on iron in pigs, on which the statutory duty was 75 cents per ton, the maximum to which it could be raised under Section 315 was $1.125 per ton. The report of the Commission discloses that the difference in costs of production at home and abroad was over $7 per ton, and it was unnecessary in that case to do more than find that the difference exceeded $1.125 per ton.

There have been 25 reports by the Tariff Commission under this section. In two, those relating to sugar and casein, no change in tariff was made because the costs were not ascertainable. In one, that relating to cotton warp-knit fabric and fabric gloves, the difference in costs was found, but as the existing duty equalized it, no change in the tariff was made. In one, relating to wall pockets, the Commission

89167—28——4

reported that there was no substantial production in the United States. In the other 21 cases, changes in tariffs have been made. In 12 of these it was unnecessary to find the exact costs of production at home and abroad, because it developed that the differences were so great that the maximum changes in tariffs permitted by the statute would not equalize them.

This subject was dealt with by the Attorney General in an opinion rendered to the President October 19, 1927 (35 Op. 325), relating to the case of rag rugs. In that case the Tariff Commission had become satisfied that the cost of production of rag rugs in Japan did not exceed the invoice price of imported Japanese rugs. It had, however, made no thorough investigation into the costs of wages, materials, and other items entering into the cost of production in Japan, and the question arose whether it had made such a report as the statute makes a condition precedent to action by the President, as it had not made a report on costs of wages, materials and other items specified in subdivision (c) of the Act, as matters which the President shall take into consideration in so far as he finds it practicable.

The Attorney General reached the conclusion in that case that as it had been determined that the Japanese cost of production was not more than a stated amount, and since the difference between the costs of production in the United States and in Japan on that basis was so great that the maximum change permitted by the statute in the tariff would not

equalize it, there was no necessity for minute investigation of wages and costs of materials in Japan, and that such an investigation might be held by the President to be impracticable because futile.

The reports of the Tariff Commission under Section 315 and the proclamations of the President thereunder, have been printed only in pamphlet form. A digest of them is contained in the appendix to this brief.

There is nothing more intricate or difficult about the finding of costs of production of merchandise than in determining what is a reasonable charge for carriage of a commodity by railroads. Fixing the rates for public utilities is a legislative matter. Examining the facts to determine what is a reasonable rate is delegated to commissions and boards, but that is not an unlawful delegation of legislative authority merely because the facts are difficult to ascertain.

Presence or absence of the right to judicial review of the findings of the Commission and of the President under Section 315 has nothing to do with the question whether there is an unlawful delegation of legislative authority. If the Legislature has made an unlawful delegation of legislative power to the executive branch, it would not help matters to bring the judiciary into the matter.

In those cases where the exercise of legislative power may run counter to the constitutional provision preventing confiscation of private property, as in rate making, ultimate judicial review of legislative or administrative findings of facts as to the reason-

ableness of rates must be allowed, but no importer has a constitutional right to any particular tariff, and a tariff may be raised or lowered so as to destroy an importer's business without giving him any right to relief in the courts.

Of course, if the provisions of Section 315 are not complied with, and the President should depart from the formula prescribed in it or should act without receiving a report from the Tariff Commission, or in other respects plainly exceed the powers vested in him by this statute, an importer might obtain judicial relief from the duty thus imposed, but no such question is presented here, and we can not see how the matter of judicial review has anything to do with this case.

It seems clear that the statute delegates only the power to find facts, not the power to make laws, and under elementary rules long settled it must be sustained against the charge that it unlawfully delegates legislative authority.

II

PROTECTIVE TARIFFS ARE AUTHORIZED

It is too late in the day to question the power of Congress to protect American industry, through the operation of laws imposing duties on imports. In the first session of the first Congress, the second law placed on the statute books (Act of July 4, 1789, c. 2, 1 Stat. 24) declared that the duties there named were imposed because—

> it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandise imported.

Congress has power not only to tax foreign commerce, but to regulate it. In *Buttfield* v. *Stranahan*, 192 U. S. 470, it was said (p. 492):

> The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to ad-

mission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237; Rev. Stat. sec. 2933 *et seq.*

The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, as exclusive and absolute, and was declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations."

* * *

See also *The Abby Dodge*, 223 U. S. 166.

Brolan v. *United States*, 236 U. S. 216, 218.

Weber v. *Freed*, 239 U. S. 325, 329.

Yee Hem v. *United States*, 268 U. S. 178.

Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320, 334, 342.

Strathearn S. S. Co. v. *Dillon*, 252 U. S. 348, 356.

CONCLUSION

The sections of the Tariff Act in question are valid and the judgment of the Court of Customs Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY, 1928.

APPENDIX

(Report of the United States Tariff Commission to the President of the United States, transmitted May 14, 1924)

INVESTIGATION OF THE DIFFERENCES IN COSTS OF PRODUCTION OF BARIUM DIOXIDE

To the President:

The United States Tariff Commission respectfully submits the following report upon an investigation of the differences in costs of production of barium dioxide in the United States and in competing foreign countries, for the purposes of section 315 of Title III of the tariff act of 1922.

INTRODUCTORY

Reference to files.—The following documents have been used in the preparation of this report and are on file for reference in the office of the Tariff Commission:

Files of original documents, including applications (2) and expert's preliminary report.

Confidential report to commission, dated October 29, 1923. (Referred to as Expert's 10/29 report.)

Public statement of information on barium dioxide dated November 5, 1923.

Stenographer's minutes of public hearing on November 9, 1923.

Brief for John Bené & Sons; a petitioner, by Walter Evans Hampton, dated New York, November 15, 1923. (Referred to as Opposition brief.)

Confidential memorandum of chemical division relative to weighted average costs of production, dated December 6, 1923. (Referred to as Expert's 12/6 memorandum.)

Advisory board's confidential summary to the commission, dated December 12, 1923. (Referred to as Board's summary.)

Rates of duty.—Act of 1922, paragraph 12, 4 cents per pound. (This duty during 1923 was equivalent to 47.6 per cent ad valorem based on an average invoice price of 8.4 cents per pound.)

Act of 1913, paragraph 10, 1½ cents per pound. (This duty during the period October 4, 1913, to June 30, 1914, was equivalent to 27.8 per cent ad valorem based on an average invoice price of 5.4 cents per pound.)

Act of 1909, paragraph 3, 25 per cent ad valorem. (This duty of 25 per cent ad valorem during the period 1910 to 1913, inclusive, was equivalent, applied to an average invoice price of 6.87 cents per pound, to a specific duty of 1.72 cents per pound.)

History of the investigation.—On March 27, 1923, the commission ordered an investigation of barium dioxide for purposes of section 315 of the tariff act of 1922. Application No. 87, requesting an increase in the duty on barium dioxide, was received on November 28, 1922, from the J. H. R. Products Co. of Willoughby, Ohio. Application No. 121, requesting a decrease in the duty on barium dioxide, was received on January 22, 1923, from John Bené & Sons (Inc.), of New York City.

The domestic and foreign cost investigations were conducted during the months of May to July, 1923. After public notice had been given in due form the customary public hearing was held at the office of

the commission in Washington on November 9, 1923. The hearing was closed on that date, and November 20, 1923, was set as the date for filing briefs. Oral argument was waived by interested parties.

Because of the change in the monetary system of Germany, which took place in November, 1923, when the rentenmark was introduced, the commission thought it advisable to ascertain the effect of this stabilized currency on Germany production costs for barium dioxide. Representatives of the commission in Germany also obtained German production costs for March, 1924. It was ascertained by the commission that domestic costs for the first quarter of 1924 had not changed substantially over those for 1922, which are given in this report.

INFORMATION OBTAINED IN COMMISSION'S INVESTIGATION

From the investigation of barium dioxide as outlined above, the following information has been obtained:

PRINCIPAL USES

Barium dioxide, more correctly known as barium peroxide, is employed chiefly in the manufacture of hydrogen peroxide, which is widely used as a bleaching agent and as an antiseptic. Hydrogen peroxide made from barium dioxide competes with hydrogen peroxide made either from sodium peroxide or by an electrolytic process. (Expert's 10/29 report, pp. 1–2 and Minutes, public hearing, pp. 66ff.)

PRODUCTION, CONSUMPTION, IMPORTS, AND EXPORTS

Prior to the World War barium dioxide was not produced in the United States. According to the reports of the United States Geological Survey,

domestic production, which began in 1915, increased from 612,000 pounds in that year to 5,110,000 pounds in 1917, and then declined to 1,716,000 pounds in 1919. Production in 1922 showed a slight increase over that in 1919. (Expert's 10/29 report, p. 2.) Accurate statistics of foreign production are not available; Germany is probably the largest foreign producer, with England and France probably second and third, respectively. (Expert's 10/29 report, p. 3.)

During the period 1918 to 1923 the domestic consumption has averaged 4,000,000 pounds per year. The J. H. R. Products Co., applying for an increase in the duty, has plant capacity sufficient to supply this requirement. (Expert's 10/29 report, p. 3.)

From 1910 to 1914 imports ranged from three and one-half to six million pounds per year. Imports from 1910 to 1923 have been as follows (Expert's 10/29 report, p. 4):

TABLE 1.—*Barium peroxide—Imports for consumption, 1910–1924*

Year	Pounds	Foreign invoice value	Unit invoice value per pound
Fiscal year:			
1910	3,563,528	$261,674	$0.073
1911	4,896,563	347,129	.071
1912	3,715,823	255,053	.069
1913	3,507,508	215,500	.061
1914 [1]	882,385	49,611	.056
1914 [2]	5,203,413	280,528	.054
1915	4,084,144	317,262	.077
1916	546,442	48,451	.088
1917 [3]			
1918 [3]			
Calendar year:			
1919 [3]			
1920	501,673	64,447	.128
1921	1,337,972	127,631	.095
1922 (first 9 months)	1,304,143	125,065	.096
1922 (last 3 months)	714,051	64,269	.090
1923	1,810,593	152,270	.084
1924 (Jan.-Mar.)	298,805	22,467	.075

[1] From July 1 to Oct. 3, 1913.
[2] From Oct. 4, 1913, to June 30, 1914. Exports of barium dioxide are negligible.
[3] No imports.

PRICES

Barium dioxide prices were not published in the trade journals prior to July, 1915, when the price was 22 cents per pound. In July, 1916, the quoted price was 38 cents, from which figure the quoted price receded to 18–20 cents during 1923. These quotations are reported by the trade to be higher than contract prices. During 1923 the J. H. R. Products Co. claimed to have had difficulty in disposing of its product at 15 to 16 cents per pound because of competition from abroad. The New York selling prices on the foreign product, secured by the commission in December, 1923, were 13 cents per pound for English and French 87.5 per cent barium dioxide, and 13.4 cents per pound for German 80 to 82 per cent barium dioxide (equivalent to 14.3 cents per pound on the basis of 87.5 per cent barium dioxide). (Expert's 12/6 memorandum.)

Relative prices of barium dioxide and of hydrogen peroxide.—As pointed out above, barium dioxide is employed chiefly for making hydrogen peroxide, which is used industrially as a bleaching agent and for medicinal purposes. The medicinal product, if marked "U. S. P." (United States Pharmacopœia), must be an aqueous solution containing not less than 3 per cent by weight of hydrogen peroxide (H_2O_2).

Barium dioxide is known to the public in the form of hydrogen peroxide. It was stated at the public hearing that for 1 pound of barium dioxide from 4¼ to 5 pounds of hydrogen peroxide (standard 3 per cent strength) can be produced, depending upon the percentage strength of the barium dioxide used. (Minutes, public hearing, pp. 170 and 181.) It was also stated that the cost of making hydrogen peroxide was 3.6 cents per pound based on a price of 13.4 cents per pound for barium dioxide and deducting the value

of the by-product, blanc fixe, which is obtained when barium dioxide is converted into hydrogen peroxide. Upon these facts the manufacturing cost of hydrogen peroxide in bulk is less than 4 cents per pound. Based on these yields a change of 1 cent per pound in the price of barium dioxide is equivalent to a change of 1/5 cent per pound of hydrogen peroxide. Therefore, an increase in the duty on barium dioxide of 2 cents per pound would correspond to an increase in the cost of hydrogen peroxide of about 4/10 cent per pound.

Evidence given at the public hearing tends to show that hydrogen peroxide is sold in drug stores in pound bottles at retail prices ranging from 25 to 40 cents depending somewhat upon the trade-mark name under which the article is sold. The evidence also tends to show that hydrogen peroxide is sold in pound bottles in chain stores, generally not under any trade-mark, at retail prices ranging from 15 to 16 cents. (Minutes, public hearing, pp. 168, 209.

One witness stated at the hearing in November 1923 (p. 220), when the price of barium dioxide was about 15 to 16 cents per pound, that the price of hydrogen peroxide in drug stores was the same as when barium dioxide was selling for 38 cents per pound. Another witness stated (p. 222) that a change in the price of barium dioxide would affect the price of hydrogen peroxide in the chain grocery stores, where it is sold at a lower price and on a smaller margin of profit than at the drug stores.

The evidence does not indicate that an increase in the retail price of hydrogen peroxide—the form in which barium dioxide reaches the ultimate consumer—need follow an increase in the price of barium dioxide.

PRINCIPAL COMPETING COUNTRIES

The imports of barium dioxide into this country from September, 1922, to July 1, 1923, by countries of origin, have been as follows: (Expert's 10/29 report, pp. 5–5a.)

TABLE 2.—*Barium dioxide—Imports for consumption, by countries, September, 1922, to July 1, 1923*

Imported from—	Pounds	Value	Average price c. i. f. New York, duty not paid
			Per pound
Germany	920, 974	$81, 739	$0. 0888
France	349, 075	32, 940	. 0944
England	112, 608	13, 206	. 1126

The following table shows imports of barium dioxide and the average invoice price by months and by countries of origin during the period January, 1923, to March, 1924, inclusive.

TABLE 3.—*Barium dioxide—Imports for consumption, by countries, January, 1923, to March, 1924*

Year and month	Germany		England		France		Total, all countries	
	Pounds	Invoice price per pound	Pounds	Invoice price per pound	Pounds	Invoice price per pound	Pounds	Invoice price per pound
1923		*Cents*		*Cents*		*Cents*		*Cents*
January	143, 184	8. 9	33, 965	11. 5			177, 149	7. 6
February	87, 176	7. 4	11, 141	12. 9			98, 317	8. 1
March	87, 428	8. 0	33, 749	11. 1	53, 290	7. 4	194, 387	8. 4
April	174, 506	8. 0	45, 093	9. 7	67, 141	8. 0	297, 902	8. 3
May	175, 619	8. 8	11, 030	12. 1	44, 573	7. 9	231, 422	8. 8
June			55, 906	10. 6			55, 906	10. 6
July	66, 178	8. 9	22, 028	10. 4			88, 206	9. 3
August	153, 754	8. 6					153, 754	8. 6
September	151, 947	8. 5	11, 003	13. 5			162, 950	8. 9
November	213, 372	8. 0	71, 499	9. 1			284, 871	8. 3
December	55, 303	7. 1	10, 226	10. 0			65, 729	7. 6
Total	1, 308, 969	8. 0	305, 640	10. 5	175, 004	7. 7	1, 810, 893	8. 4
1924								
January			45, 386	7. 0			45, 386	7. 0
February			84, 019	8. 0			84, 019	8. 0
March			146, 977	7. 0	22, 423	8. 0	169, 400	7. 4

During the year 1923 Germany supplied 72 per cent, England 17 per cent, and France 10 per cent of the total imports of barium dioxide entering the United States. For the purposes of this investigation, it appears that Germany is the "principal competing country."

COSTS OF PRODUCTION

Domestic.—Barium dioxide is made by two companies in the United States—by the Oakland Chemical Co., of New York City, company A, for its own use, and by the J. H. R. Products Co., of Willoughby, Ohio, company B, for sale. The cost details for each of these producers and also the weighted average cost figures are given in the confidential memorandum attached to this report (not published).

Foreign.—Foreign costs were obtained by the commission in England (one company) and France (one company). The commission was unable to secure actual book costs for 1923 from either of the two producers in Germany. However, a statement of the cost of production of one German company for the first half of 1923 was furnished to the commission's representatives, who were not allowed to check or verify it. In the case of the second German company book costs for 1913 were obtained by agents of the commission. These costs were adjusted to 1923 by taking into account changes which had subsequently taken place in prices of raw materials, wages, and other cost factors. These calculations are regarded as reliable when considered in connection with selling prices of the German product. Details are presented in the attached confidential memorandum, par. 2 (not published).

Because of the change in the monetary system of Germany, which took place in November, 1923, when the rentenmark was introduced, the commission thought it advisable to ascertain the effect of this stabilized currency on German production costs for barium dioxide. The costs of the second German company referred to above were further revised as of March, 1924, by representatives of the commission in Germany. It was ascertained by the commission that domestic costs for the first quarter of 1924 had not changed substantially over those for 1922, which are given in this report.

Comparison of foreign and domestic costs.—The following table presents a comparison of the weighted average domestic costs with the German costs calculated as outlined above. In order to avoid disclosing costs of production of individual companies, such disclosures being prohibited by section 708 of the revenue act of 1916, the comparison is made in percentages, the domestic costs being taken as 100.

TABLE 4.—*Comparison of domestic and German production costs of barium dioxide by percentages*

	Domestic costs, 1922	German costs	
		June, 1923	March, 1924
Materials	100	[1] 33. 6–37. 4	[1] 44. 7–49. 8
Containers	100	73. 4	73. 4
Direct labor	100	9. 25	30. 7
Factory expense	100	15. 8	37. 6
General expense	100	104. 0	60. 5
Total factory cost	100	[1] 32. 9–34. 7	[1] 42. 6–45. 0

[1] The variation in the percentages for German material and total factory costs reflects different bases for the calculation of the domestic costs of raw materials as discussed in the attached confidential memorandum.

COMPETITIVE CONDITIONS

As previously pointed out, there is only one domestic company which produces barium dioxide for sale in the open market. The other domestic manufacturer consumes his entire production of barium dioxide for the manufacture of hydrogen peroxide. It should be noted, however, that hydrogen peroxide produced from barium dioxide competes with hydrogen peroxide produced from sodium peroxide and with hydrogen peroxide produced abroad by an electrolytic process.

Evidence was offered at the public hearing to the effect that English barium dioxide was sold to consumers in Canada for 17 cents per pound delivered at factory while at the same time it is offered in the United States for 9 to 11 cents per pound c. i. f. New York, duty unpaid, 13 to 15 cents duty paid. It was claimed that the elimination of domestic company B from the open market would be followed by the same prices in this country as prevailed in Canada. (Minutes, public hearing, pp. 53–55 and 115.)

SUMMARY

Findings of fact to the following effect are, in the judgment of the Tariff Commission, warranted by the evidence collected in the investigation and summarized in the commission's report:

1. Germany is the principal competing country.

2. The difference in costs of production between Germany and the United States is greater than 6 cents per pound. This difference between domestic and German costs exists whether the comparison is based on costs at factory or on factory costs plus transportation to the principal market—New York.

3. The present duty is 4 cents per pound. The increase in duty necessary to equalize the differences in costs of production of barium dioxide in the United States and in Germany, the principal competing country, within the limit provided in section 315, is 2 cents per pound, making the total duty 6 cents per pound.

THOMAS O. MARVIN,
Chairman.
WILLIAM S. CULBERTSON,
Vice Chairman.
DAVID J. LEWIS,
EDWARD P. COSTIGAN,
WILLIAM BURGESS,
HENRY H. GLASSIE,
Commissioners.

PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA INCREASING RATE OF DUTY ON BARIUM DIOXIDE

Whereas in and by section 315 (a) of Title III of the act of Congress approved September 21, 1922, entitled "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes," it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said ascertained differences in such costs of production necessary to equalize the same;

Whereas in and by section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing

foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to the article described in paragraph 12 of Title I of said tariff act of 1922, namely, barium dioxide, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Germany,

and has ascertained and determined the increased rate of duty necessary to equalize the same:

Now, therefore, I, CALVIN COOLIDGE, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this nineteenth day of May in the year of our Lord one
[SEAL.] thousand nine hundred and twenty-four, and of the independence of the United States of America the one hundred and forty-eighth

CALVIN COOLIDGE.

By the President:

CHARLES E. HUGHES,
Secretary of State.

[No. 1698]

DIGEST OF TARIFF COMMISSION REPORTS UNDER SECTION 315 OF THE TARIFF ACT OF 1922.

(1) SODIUM NITRITE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1924.

The Commission found the costs of production and the President increased the duty. The findings of the Commission show that the difference in costs was much more than could be equalized by a 50% increase in the duty, showing exact costs unnecessary to be ascertained.

(2) WHEAT AND WHEAT PRODUCTS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1924.

The Commission found the exact costs of production at home and abroad and the exact differences, and the President raised the tariff on wheat and some wheat products and reduced it on other wheat products. The reduction in the duty on bran, shorts, and by-product feeds was 50%, and the findings show that the differences in costs were much greater than the permitted decrease in the tariff would equalize.

(3) BARIUM DIOXIDE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1924.

The Commission found that the difference in costs was greater than six cents per pound, and the specific duty of four cents per pound was raised to the maximum permitted by law, viz., six cents per pound.

(4) DIETHYLBARBITURIC ACID AND DERIVATIVES (Barbital or Veronal). Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The findings of the Commission show that the differences in costs were greater than could be equalized by 50% increase in the rate of the ad valorem duty. The President changed the basis of computing the ad valorem duty to the American selling price and reduced the rate to 25%.

(5) OXALIC ACID. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The specific statutory duty was four cents per pound and the maximum allowed by statute was six cents per pound. The Commission did not find the differences of costs exactly, but determined that they were larger than the permitted increase in duty would equalize, and the duty was raised to the maximum.

(6) POTASSIUM CHLORATE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The specific statutory duty was 1.5 cents per pound. The maximum allowed by law was 2.25 cents per pound. The Commission reported that the differences in costs of production were much greater than could be equalized by the permitted increase and the duty was raised to the maximum.

(7) LIVE BOBWHITE QUAIL. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The cost of trapping in Mexico was determined to be $0.517 per bird, while the cost in the United States was $0.728 per bird, the difference being $0.211 per bird. The specific duty of 50 cents per bird was found

to be $0.289 too much. The reduction permitted was only to 25 cents per bird, and the duty was changed accordingly.

(8) SUGAR. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

In this report the Commission divided 3 to 2 as to the differences in costs of production at home and abroad. The President held:

> After full consideration of all the facts shown in the reports of the members of the tariff commission I do not find that differences in cost of production are sufficiently established under present conditions to warrant any change from the present duty.

(9) CASEIN. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

The Tariff Commission reported that the data which it had been found possible to secure in its investigation in the costs of production in the domestic and foreign fields were insufficient to form a basis for any change in the duty.

(10) COTTON WARP-KNIT FABRIC GLOVES AND COTTON WARP-KNIT FABRIC. Reports of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

The Commission found the costs of production at home and abroad and also concluded that the differences were already equalized by existing tariffs, and the President took no action.

(11) TAXIMETERS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

These were subject to a statutory compound duty of $3 each and 45% ad valorem. The Commission

found the exact difference in cost of production to be $40.98. As the difference could not be equalized under subdivision (a), the basis was changed to the American selling price, and the ad valorem rate to 27.1% instead of 45%, and the specific duty remained the same.

(12) MEN'S SEWED STRAW HATS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

The exact costs of production at home and abroad were determined and the rate increased to 88% ad valorem, slightly less than the maximum permitted.

(13) BUTTER. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

This was subject to a statutory specific duty of eight cents per pound, the maximum allowed being twelve cents per pound. The Tariff Commissioners differed as to the costs of production at home and abroad, their differences ranging from 11.9 cents per pound to 14.95 cents per pound, or more. The President concluded that the difference was at least 12 cents per pound and fixed the maximum duty.

(14) PRINT ROLLERS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

These were subject to an ad valorem duty of 60%. The Commission determined the exact differences in cost of production and the rate was raised to 72%, less than the maximum allowed.

(15) PAINTBRUSH HANDLES. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

These were subject to an ad valorem duty of 33⅓%. The Commission reported that the exact

difference in costs of production was not ascertainable, but that the difference was so small that a reduction of 50% in the rate of duty would not equalize it. The maximum decrease in duty permitted was made, the rate being reduced to 16⅔%.

(16) GOLD LEAF. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

This was subject to a specific duty of 55 cents, which was raised to 82½ cents, the maximum permitted by law. The difference in costs of production was greater, being found to be 83.8 cents.

(17) SWISS CHEESE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to a duty of five cents per pound, but not less than 25% ad valorem. It was raised to 7.5 cents per pound, and not less than 37½ per cent ad valorem, the maximum permitted by law.

(18) CRESYLIC ACID. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to a compound duty of 40% ad valorem and seven cents per pound. The exact difference in cost of production was determined to be 79.7% per pound. The duty was reduced to the minimum permitted by law, 20% ad valorem plus 3½ cents per pound. This produced a duty of 121.7 as against a difference in cost of 79.7, showing it was unnecessary to determine the exact difference in costs.

(19) METHANOL. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to the specific duty of 12 cents. The Commission reported that the difference in

costs of production at home and abroad was either 27.49 cents or 24.78 cents, depending on the method used to ascertain it. The duty was raised to 18 cents, the maximum permitted, and much less than was necessary to equalize the difference in costs of production.

(20) IRON IN PIGS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to a specific duty of 75 cents per ton. The difference in costs at home and abroad was determined to be $7.16 per ton. The duty was raised to $1.125 per ton, the maximum permitted by law.

(21) PHENOL. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1928.

This was subject to a compound duty of 40% ad valorem and 7 cents per pound. It was reduced to 20% ad valorem and 3½ cents per pound. The exact difference in costs was 36.7%, and on the same basis the new duty was 76.8, showing that it was not necessary to show the exact costs of production.

(22) MAGNESITE.—Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1928.

The crude was subject to a specific duty equivalent to $6.25 per ton. The difference in cost of production was found to be $11.10 per ton. The duty was raised to $9.375 per ton, the maximum permitted.

The specific duty on caustic calcined magnesite was equivalent to $12.50 per ton; the difference in cost $19.68 and the new duty $18.75, the maximum permitted.

(23) CHERRIES. Report of the United States Tariff Commission to the President of the United States, 1928. (Not yet printed.)

These were subject to a specific duty of 2 cents per pound, which was increased to 3 cents per pound, the maximum permitted. The difference in costs of production was 5 cents to 7 cents per pound, showing that it was not necessary to determine exact costs.

(24) WALL POCKETS. Report of the United States Tariff Commission to the President of the United States, 1928. (Not yet printed.)

It was found that there was no industry in the United States and only one concern had made wall-pockets in the United States, and its operations were never profitable and no costs data was reported.

(25) RAG RUGS. Report of the United States Tariff Commission to the President of the United States, 1928. (Not yet printed.)

These were subject to an ad valorem duty of 35% per pound. The difference in costs of production found were too great to be equalized by increasing the rate to 52.5%. Under subdivision (b) the basis was changed to the American selling price and the rate of duty left at 35%. The difference in costs was too great even to be equalized by this adjustment, so that it was not necessary to determine exact costs of production.

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